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Hon. Philip Isenberg, Chair; and Members
Delta Vision Task Force
650 Capitol Mall
Sacramento, CA 95814

Re: Constitutional and Statutory Amendments to Consider

Honorable Members of the Task Force:

With some embarrassment at the delay, I am writing to place before you constitutional and statutory suggestions submitted earlier this month to Senator Steinberg and his committee preparatory to the special session hearing on the proposed water bond measures. We should all be grateful that consciously or unconsciously the Legislature has agreed to await your report and recommendations before considering the placement of measures before the electorate. Informed and concerned Californians are awaiting your future reports with expectation that they will help us establish sound policy that must precede major political and financial investment in a 21st century water program. In the aspiration to assist in that effort, these remarks are submitted.

Let me draw on California's experience in the 1920s. Then the State had reached an impasse, as riparian rights flourished but their unlimited exercise threatened the development of storage capacity for municipal and hydroelectric use. When the California Supreme Court in *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81 venerated riparian rights over all other considerations, water leaders in our State responded by crafting a constitutional amendment, adopted by the people in 1928, which remains our bedrock mandate for reasonable and beneficial use of all water resources. (CAL. CONST. art. X, § 2.)

Today California stands at a similar crossroads. Like the riparians' excesses of the 1920s, today's appropriative excesses have placed both our ecosystems and water reliability at great risk; with permanent limitations imposed or imminent in the Delta, the Eastern Sierra, and the Colorado, we are witnessing, at least short-term, "the end of

California water." To these perils we now add the reality of climate change as a transcendental constraint. It is time for our best leaders, and not just the riparians and appropriators, to discern the constitutional and statutory structure that creates the security and protection of our environment, as a prerequisite of major manmade revisions to that environment.

Here in my perspective of 25 years of teaching and 35 years of practice are measures that should be publicly debated, improved, and acted upon for inclusion in any package that will include presenting a bond measure to the electorate. My hope is that they complement and amplify the comment of colleague Professors Hap Dunning, Brian Gray, and Clark Kelso, submitted within the past fortnight. These measures are designed to create the political and legal structure that, together with physical and engineering measures developed by other disciplines, render the risk of manmade change acceptable. They include provisions for vigorous and effective judicial review because the judicial department must be engaged to ensure that important non-majoritarian interests are protected.

1. Adoption into the Constitution of the public trust doctrine, as expressed by the California Supreme Court in the Mono Lake case (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419). As applied to water resources, the public trust doctrine has been broadly accepted for a generation as an integral part of our legal heritage and water-resource administration; it deserves a (presently unoccupied) place in our Constitution. Such a measure should include the Supreme Court's premises that (1) trust values be protected whenever feasible; (2) the State and its agencies hold an ongoing duty to reconsider and readjust past allocations that threaten trust values; and (3) public trust determinations are reviewed by the courts in the exercise of their independent judgment. Interpreting that mandate, the State Water Resources Control Board in both its Mono Lake (D. 1631) and Imperial to San Diego Water Transfer (D. 2003-0013, 0016) cases embraced air quality as a trust resource to be protected in its determinations. To address climate change in the context of water allocations, the constitutionally-defined public trust should expressly include air as well as water as a trust resource.

2. Adoption into the Constitution of the watershed of origin doctrine, protecting each tributary watershed in the State from excessive appropriations out of that watershed to other watersheds, including those downstream of the individual tributary. Such a measure would validate the 1955 Attorney General opinions (25 Ops. Cal. Atty. Gen. 8, 25 Ops. Cal. Atty. Gen. 32) on which the State Water Project was approved in 1960, including the bases of those opinions, namely that no appropriation should deprive an upstream tributary watershed of the entirety of its only natural supply. In addition to benefiting the watershed of origin, this doctrine serves the entire state by discouraging appropriation to the edge of unsustainability. It bears emphasis that a watershed-of-origin constitutional amendment was proposed in the 1950s as a predicate to adoption of the State Water Project; this unfinished business in California's docket is a half-century overdue.

3. Establishment into the Constitution of the State Water Resources Control Board as a constitutional agency on par with the Public Utilities Commission, with assured funding and tenure of appointment. If water is, as often claimed, our most important California resource, its governance should be matched in the dignity we accord to electricity and motor vehicle carriers. State Board decisions, however, need not be subject to review only in the Supreme Court; neither should this fact-finding and adjudicatory agency be subject to superior court retrial. A reasonable balance would require first-instance judicial review of State Board decisions by the Court of Appeal.

4. Confirmation by statute or resolution that in the judicially-required reconsideration of the Monterey Amendments (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 893), the Director of the Department of Water Resources shall reinstall articles 18(a) and 18(b) of the original State Water Contracts, shall pursuant to those articles reduce permanent table A amounts to conform to the long-term reliable delivery of the State Water Project, shall assert a State trust interest in the Kern Water Bank, and shall not approve long-term transfers of table A amounts without finding that they represent the most reasonable and beneficial use of the State's water resources. Our predecessors who created the State Water Project wisely established the article 18 mechanisms in anticipation of today's reality: that the environment cannot sustain a permanent distribution of 4.2 MAF annually from the project. Article 18 must be reinstalled so that expectations of future deliveries, and legal expectations, conform to environmental realities. Moreover, the State must retrieve for statewide benefit the largest groundwater bank in the world, and must ensure that when state facilities are used to reallocate water, a state officer determines that the reallocation serves the overall state good and not merely those of the trading parties.

5. To ensure judicial review of water resource determinations involving multiple parties and complex structures, modification of the indispensable party doctrine (Code Civ. Proc., § 389) to provide that in any litigation if a single indispensable party is named, others shall be allowed to intervene of right, but the proceeding shall not be dismissed for failing to name any remaining indispensable parties. The recent past has seen an epidemic of ambitious water districts evading judicial review (or causing years of delay in attempting to do so) because litigants cannot at the outset identify all potentially interested parties, or have the wherewithal to name hundreds of them. The Legislature can determine by amendment to section 389 that justice is best served by allowing any party claiming an interest to participate in litigation, rather than arming that party with the abusive weapon of dismissing judicial review entirely.

In conclusion, let me ask the Task Force to identify and at the appropriate time incorporate these measures as an important component of future Delta "governance."

Respectfully submitted,